Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:SCA:SD:GL-807734-99
JJPosedel

date: AUG 30 1999

to: Group Manager, Large Case Collection Group, Southern California District
Attn: Revenue Officer Dan Smith, Laguna Niguel

from: Associate District Counsel, Southern California District, San Diego

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subject: **Statute of Limitations For Assessment of Trust Fund Recovery Penalty**

Taxpayers: [redacted]

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This advice is not binding and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in this case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

You have requested our advice concerning the assertion of the trust fund recovery penalty under the circumstances set forth below. The factual pattern of both cases is similar.

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FACTUAL BACKGROUND

[redacted]

The periods involved in the Examination and Criminal Investigation Divisions' inquiry were the first quarter of [redacted] through the third quarter of [redacted]. During the course of the investigation, it was determined that, pursuant to an elaborate scheme apparently concocted by [redacted] and [redacted], each a [redacted]% owner and officer of [redacted] ([redacted]), [redacted]'s Form 940 and 941 liabilities for the periods in question were understated by some $[redacted]. Both [redacted] and [redacted] were indicted under 18 U.S.C. § 371, Conspiracy to Defraud the United States. [redacted] was also indicted on [redacted] counts of tax evasion relating to the fourth quarter of [redacted] and the first three quarters of [redacted], [redacted] counts of evasion relating to [redacted]'s FUTA liability for [redacted] and [redacted], and [redacted] counts of subscribing to false personal income tax returns for [redacted] and [redacted]. [redacted] was indicted on [redacted] counts of aiding and abetting [redacted]. In addition, [redacted] was indicted for subscribing to false personal income tax returns for the years [redacted] and [redacted]. According to a copy of the plea agreement, [redacted] pleaded guilty to [redacted] count of evasion relating to the Form 941 of [redacted] for the [redacted] quarter of [redacted], and [redacted] count of conspiracy to defraud the United States. According to the examining agent, [redacted] pleaded guilty to [redacted] count of conspiracy to defraud and [redacted] count of subscribing to a false personal income tax return.

In addition to the deficiencies in employment taxes (both 940 and 941 liabilities), the fraud penalty was asserted in each instance; all deficiencies and fraud penalties were assessed on [redacted]. The revenue officer proposes to assert the Trust Fund Recovery Penalty against [redacted] for each of the quarterly periods involved.

[redacted]

The periods investigated by Examination and CID spanned from the first quarter of [redacted] through the fourth quarter of [redacted]. In an Information, the officers, [redacted], were alleged to have attempted to evade and defeat the payroll taxes due the United States for the fourth quarter of [redacted] in violation of I.R.C. § 7201. We are advised that each person pleaded guilty as charged. The examining revenue agent secured signed Forms 2750 from both [redacted] and [redacted] extending the period for assessment of the Trust Fund Recovery Penalty for the four quarters of [redacted] to [redacted]. No waivers were obtained for any of the [redacted] or [redacted] quarters.

ISSUE

Assuming that the fraud penalty was appropriately asserted with respect to each of the quarterly employment tax liabilities, are the periods of limitation with respect to each of such quarters open for the assertion of the Trust Fund Recovery Penalty against the responsible persons of each corporation?

DISCUSSION

At the outset, we note that we have had no input regarding the assertion of either the payroll tax deficiencies or the fraud penalties assessed in connection therewith. As stated above, we will assume that the fraud penalty has been appropriately asserted in each instance.

It has been the Internal Revenue Service's position for a number of years that the trust fund recovery penalty must be assessed within three years of the presumptive filing date of the Forms 941 (under I.R.C. § 6501(b)(2), April 15 of the year following the quarterly periods of the previous year--provided the returns are actually filed prior to that date--or, if no return has been filed, the assessment can be made at any time). The three year statute of limitations is the normal period for assessment under I.R.C. § 6501(a). I.R.C. § 6501(c) contains some exceptions to the normal three year period of limitations, chief among which, for the purposes of this discussion, are the exceptions for a false or fraudulent return filed with the intent to evade or a wilful attempt to defeat or evade a tax other than an income or estate and gift tax. In such cases, the tax may be assessed at any time. Employment taxes would fall into this latter category. If the understatement of employment tax was due to a false or fraudulent corporate employment tax return made with the intent to evade or was due to a wilful attempt to defeat or evade such employment tax in any way, it would seem to follow that the trust fund recovery penalty, which is derivative from the Withholding and Federal Insurance Contribution Act (Form 941) liability, could be assessed at any time under I.R.C. § 6501(c)(1) or (2). We have found no case law on this point but we have coordinated our position with the Field Service Division of our National Office.

Please address any questions to James Posedel of this office at (619) 557-6014.

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By: /s/
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Attorney

cc: Assistant Regional Counsel (GL), Western Region